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Supreme Court, U.S.
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No. 96-328

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

The Wilson Corporation, *et al.*,
Petitioners,

v.

Tom Udall, Attorney General of New Mexico,
Respondent.

On Petition for a Writ of Certiorari from the Supreme Court of New Mexico

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PETITIONS' REPLY BRIEF

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October 11, 1996

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1. The Question Presented Involves a New Mexico Court of Appeals' Holding in this Case.

Respondent incorrectly states in its Brief in Opposition (hereinafter "Respondent's Brief") that the Question Presented addresses a holding by the New Mexico Court of Appeals in an earlier, related case. *See*, Respondent's Brief, p. 2. The Question Presented arises from the New Mexico Court of Appeals' holding found at *The Wilson Corp. v. State of New Mexico*, 121 N.M. 677, 916 P.2d 1344 (1996).

Specifically, the Question Presented arises from the holding that:

> The district court had ruled that the Attorney General had an improper purpose in seeking the CIDs. We reversed, holding that (1) the CIDs could be quashed only if the sole purpose of the Attorney General was an improper one . . .

Wilson, 916 P.2d at 1347.

The New Mexico Court of Appeals remanded the case in *Brewer Oil Co. v. State of New Mexico*, 121 N.M. 106, 908 P.2d 799 *cert. denied*, 120 N.M. 828, 907 P.2d 1009 (1995) for further proceedings. An appeal in *Brewer* to the New Mexico Supreme Court was not available since the case was remanded for further proceedings. Further, a petition for certiorari to this Court was not available in

Brewer because the highest court in New Mexico had not entered a final decision in the case. The final decision from which this Petition is filed occurred in this case only, notwithstanding the Respondent's attempt to mislead this Court.

The Question Presented arises from this case and no other.

2. Petitioners Accurately Stated the Law in *U.S. v. Powell*.

Respondent failed to address the complete opinion in *U.S. v. Powell*, 379 U.S. 48 (1964). In *Powell*, this Court opined that:

> It is the court's process which is invoked to enforce the administrative summons and a court may not permit its process to be abused. Such an abuse would take place if the summons had been issued for an improper purpose, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, or for any other purpose reflecting on the good faith of the particular investigation.

U.S. v. Powell, 379 U.S. at 58. Whether this Court set forth four or five requirements in *Powell* is irrelevant to an interpretation of what the opinion, read in its entirety, requires before a civil investigative demand ("CID") may be enforced. This Court's holding in *Powell* clearly

requires that CIDs may not be abused for improper purposes, even if an alleged proper purpose of conducting an investigation is also present. Approval by this Court of the improper purposes in Respondent's investigation will create a road map of approval of violations of the most basic constitutional due process prohibitions, especially if such improper purposes can be overshadowed by the guise of Respondent simply alleging a proper purpose.

3. The Affidavits Should Not Have Been Considered by the Trial Court.

The Affidavits referenced by Respondent, which allege a proper purpose, were submitted after the evidence was closed at the end of the hearing before the Trial Court. The New Mexico Court of Appeals in this case held that:

> Although the affidavits were submitted after the evidentiary hearing, the district court accepted and considered them. On appeal the Marketers have not challenged their untimeliness. In our view, it is within the district court's discretion to accept the affidavits after the hearing, at least so long as the Marketers were not precluded from responding to them if they desired.

Wilson, 916 P.2d at 1353. Petitioners, however, were not allowed to respond to the Affidavits which were filed after the ballgame was over. Further, the Affidavits, at best, established only one proper purpose. The Affidavits failed

to deny or contradict the multiple improper purposes established by the uncontroverted evidence presented by Petitioners during the hearing.

4. Petitioners Did Not Waive Their Right To Petition for Certiorari to this Court.

Petitioners, in response to Respondent's request for the Trial Court to enforce the CIDs, argued that the CIDs violated the due process requirements of the United States Constitution and the New Mexico Constitution. The Trial Court's opinion did not address the issue of whether Respondent's actions violated the United States Constitution. The Trial Court, instead, ruled in favor of Respondent and enforced the CIDs on other grounds.

The New Mexico Court of Appeals in *Wilson*, however, based its opinion on this Court's holding in *Powell* and found that a showing of at least one proper purpose was all that was required to enforce CIDs. *Wilson*, 916 P.2d at 1352. Since the Trial Court had not addressed *Powell* or the "one proper purpose" doctrine created by the New Mexico Court of Appeals on appeal, Petitioners had no reason to raise the issue of the violation of the United States Constitution regarding the Trial Court's opinion, until the New Mexico Court of Appeals issued the decision in this case.

Petitioners, in their Petition for Certiorari to the New Mexico Supreme Court, argued that the holding of the New Mexico Court of Appeals violated the due process requirements of the United States Constitution.

Accordingly, Petitioners preserved for review the Question Presented set forth in their Petition for Certiorari to this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, F. Edwin Hallman, Jr., a member of the Bar of this Court, hereby certify that on this 11th day of October, 1996, three copies of the Petitioners' Reply Brief in the above-styled case were mailed, first class postage prepaid, to:

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counsel for all the respondents herein. I further certify that all parties required to be served have been served.

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